

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
: 11-CV-06374 (DLI)
v. : 225 Cadman Plaza East
: Brooklyn, New York
RAFF & BECKER, LLP, *et al.*, :
: October 25, 2012
Defendants. :
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TRANSCRIPT OF CRIMINAL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Appearances continue on next page.)

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3 APPEARANCES (Continued) :

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1 (Proceedings began 11:06 a.m.)

2 THE CLERK: Civil cause for a status conference in
3 CV-11-06374, United States of America, *Ex Rel.* v. Raff &
4 Becker, *et al.*

5 Counsel, please state your appearances for the
6 record.

7 MR. ROSEN: Sure. For William Rold, the relator,
8 I'm Steven Rosen.

9 MS. BECKER: William Rold, Relator, Jane Becker.

10 MR. CLEARY: For the United States, Kevan Cleary,
11 Assistant U.S. Attorney.

12 MR. LURIE: Good morning, Your Honor. Adam Lurie
13 from Cadwalader for Governor Cuomo.

14 MR. HAWKINS: Good morning, Your Honor. Howard
15 Hawkins from Cadwalader.

16 THE COURT: I'm sorry?

17 MR. HAWKINS: Howard Hawkins also from Cadwalader.

18 THE COURT: And also for --

19 MR. HAWKINS: Also for Governor Cuomo.

20 MR. KOLKO: Good morning, Your Honor. Hanan Kolko
21 from Meyer Suozzi English & Klein for defendant Leonard
22 Polletta.

23 THE COURT: Just give me a moment. If you'd be kind
24 enough to give me your name again.

25 MR. KOLKO: Sure. Hanan, H-A-N-A-N, last name is

1 Kolko, K-O-L-K-O.

2 THE COURT: For Polletta.

3 MR. KOLKO: For defendant Polletta. Thank you,
4 Judge.

5 MS. WOODS: Hi. Melissa Woods also from Meyer
6 Suozzi for Defendant Polletta.

7 MS. ROSENFIELD: Good morning. Katherine Rosenfeld
8 from Emery, Celli, Brinckerhoff & Abady for Defendant M.
9 Patricia Smith.

10 THE COURT: That's Katherine with a K?

11 MS. ROSENFIELD: Yes, Your Honor. Katherine
12 Rosenfeld.

13 THE COURT: And I didn't get your client.

14 MS. ROSENFIELD: Patricia Smith, Your Honor.

15 THE COURT: Okay.

16 MS. SMITH: Thank you.

17 MR. PROSCIA: Good morning, Your Honor. Anthony
18 Proscia, P-R-O-S-C-I-A, from Lewis Brisbois Bisgaard & Smith
19 on behalf of defendants Raff & Becker, LLP, David A. Raff and
20 Robert L. Becker.

21 THE CLERK: Perhaps since we have so many people
22 here today I would ask that each time before you speak if you
23 would state your name for the record. Don't need the client
24 and firm, but just your name. Thanks.

25 THE COURT: All right. Well, the two purposes of

1 the conference today are first educate me a little bit about
2 the claims and what the status of the case is. I gather there
3 were at least some proceedings before Judge Irizarry before
4 she -- or were there? Maybe there weren't. But there may --

5 MS. BECKER: There was a conference regarding the
6 breaching of the seal by New York Attorney General.

7 THE COURT: Okay. And then -- and then --

8 MS. BECKER: Jane Becker.

9 THE COURT: Thank you. And then there's this
10 motion -- styles motion for protective order. It's actually
11 seeking somewhat different relief, but seeking some order by
12 the Court directing one of the state agencies to cease from
13 barring their employees from discussing the matter, so -- and
14 to set a schedule for dealing with that if that is necessary.

15 So let me start with the first one. Let me ask the
16 plaintiffs if you can briefly tell me the claim or the claims
17 and what has happened before Judge Irizarry.

18 MS. BECKER: Your Honor, Jane Becker. The claim is
19 a hybrid 1983 *qui tam* case under the New York and U.S. *qui tam*
20 statutes. The 1983 claim is a claim that Judge Rold was
21 harassed and finally dismissed because of his exercise of his
22 First Amendment rights while he was chief judge of the
23 Unemployment Insurance Appeals Board. There are also claims
24 for violations of the Family Leave Act and claims for
25 interference with witnesses under 1985.

1 With respect to the *qui tam* claims --

2 THE COURT: Let me back up. You said there's
3 Section 1983 case claims and I guess Section 1983 claims are
4 that your client was harassed and subsequently dismissed
5 because of statements he made, so it's violation of his First
6 Amendment rights.

7 MS. BECKER: Exactly.

8 THE COURT: And you said something about a Section
9 1985 claim.

10 MS. BECKER: For interference with witnesses.

11 THE COURT: And what is that -- what's the theory
12 there?

13 MS. BECKER: The theory there is that there -- there
14 is a claim regarding a -- one of the appeals judges who was
15 found to have been forging the signatures of some of his
16 subordinates. And Judge --

17 THE COURT: I guess I'm trying to figure out what's
18 the constitutional violation. Doesn't Section 1985 require
19 constitutional violation?

20 MS. BECKER: Exactly.

21 THE COURT: Okay. And what's the constitut -- I'm
22 just trying to figure out what constitutional violation
23 emanates from an interference with witnesses.

24 MS. BECKER: Well, but what -- 1985 specifically
25 talks about interference with witnesses. And that the

1 constitutional violation is the due process rights of the
2 claimants whose decisions were changed so that -- and in
3 almost all cases the claimants lost their claims because of
4 the decisions in which that appeals judge interfered with and
5 changed the decisions and then forged the names of the
6 other -- of his subordinate judges.

7 THE COURT: Okay. So --

8 MS. BECKER: And --

9 THE COURT: -- is that a claim on behalf of --
10 that's a claim on behalf of people other than Judge Rold then.

11 MS. BECKER: Well, it's a claim on behalf of Judge
12 Rold because Judge Rold complained about this happening and he
13 reported it to the Inspector General's Office and that was
14 when there was eventually the determination regarding that.
15 And he also asked that there be further disciplinary actions
16 taken against this judge, which the Secretary of Labor refused
17 to take. And the judge was -- there's also with that a *qui*
18 *tam* claim because this judge was allowed to ostensibly work
19 from home but did no work, so his salary was being paid by the
20 Federal Government yet no work was being received --
21 benefitting the Federal Government for monies that the Federal
22 Government paid for that judge's salary.

23 THE COURT: Okay. All right. So the -- the *qui tam*
24 part of this case is seeking to recover on behalf of the
25 Government all the monies paid to that judge?

1 MS. BECKER: That's a small part of it. The larger
2 part of it, Your Honor, is -- in terms of the federal *qui tam*
3 cases -- claims is the fact that the amelioration plan that
4 was negotiated between plaintiff's defendants and defendants
5 in the Barcia [Ph.] litigation requires that approximately a
6 quarter of -- the way that it was worked out, it requires that
7 approximately a quarter of the budget of the depart -- of the
8 Unemployment Appeals Board be spent on monitoring rather than
9 hearing the claims of unemployment seekers. And since the
10 Federal Government pays that money to the State of New York to
11 pay for the judges to hear cases, not to audit their work,
12 that money we allege constitutes a false claim.

13 Of course, you know, New York could have paid --
14 could pay that money out of its own budget but it doesn't; it
15 pays the money out of fed -- it pays those judges out of
16 federal money but then doesn't use the federal money for the
17 way that it was intended to be used.

18 THE COURT: Okay. And that was -- you said
19 something -- there was some kind of negotiation you say that
20 led to that -- to that --

21 MS. BECKER: Amelioration plan?

22 THE COURT: Yeah.

23 MS. BECKER: Yeah.

24 THE COURT: I'm not sure I understand what an
25 amelioration plan is, but there was some --

1 MS. BECKER: That is regarding the class action
2 litigation. In that litigation the parties were charged
3 with --

4 THE COURT: So the amelioration plan resulted from a
5 resolution of a class action.

6 MS. BECKER: Yes.

7 THE COURT: Okay. Okay. That's all I --

8 MS. BECKER: That's a short answer to that.

9 THE COURT: Right. So -- and which witnesses were
10 interfered with and at what stage here?

11 MS. BECKER: In terms of the 1985 --

12 THE COURT: Yes. I'm trying --

13 MS. BECKER: -- plan?

14 THE COURT: Because you said it was initially a 1983
15 claim and a *qui tam*, but then you also said there was a 1985
16 claim.

17 MS. BECKER: Right.

18 THE COURT: So there's actually a 1983 claim, a 1985
19 claim, and *qui tam* claims.

20 MS. BECKER: Exactly.

21 THE COURT: Any others?

22 MS. BECKER: There's a Family --

23 THE COURT: Oh, Family Medical Leave Act claim?

24 MS. BECKER: Exactly.

25 THE COURT: Okay. And I've -- in what -- at what

1 stage of this -- of these proceedings was there interference
2 with witnesses and -- I mean, how does that play in, I guess,
3 is what I'm trying to figure out.

4 MS. BECKER: Well, the interference with the
5 witnesses came when Judge Rold was investigating the actions
6 of the supervisory appellate judge who had been forging the
7 signatures of his subordinates.

8 THE COURT: And what do you mean? What was the
9 interference?

10 MS. BECKER: They weren't -- he wasn't allowed to
11 speak with them. Documents were destroyed repeatedly, as in
12 five times.

13 THE COURT: Okay.

14 MS. BECKER: And his -- when he tried to report it
15 to the Inspector General, the -- his report was intercepted
16 and he was told that he was not to communicate with the
17 Inspector General's Office.

18 THE COURT: Okay. So the Government has chosen to
19 join --

20 UNKNOWN SPEAKER: No.

21 THE COURT: Oh, okay.

22 UNKNOWN SPEAKER: Not yet, Judge.

23 THE COURT: Oh, I see.

24 UNKNOWN SPEAKER: We have till November 30th to make
25 that decision.

1 THE COURT: Oh, I see. Okay. So is this still
2 under seal?

3 MS. BECKER: No.

4 UNKNOWN SPEAKER: No, it's been opened up because
5 there was a mixture of claims and there was a problem of
6 timing.

7 THE COURT: All right.

8 UNKNOWN SPEAKER: So we just --

9 THE COURT: So you haven't made up your mind yet.
10 Plus it already escaped. The Attorney General let it happen,
11 right, so nobody knew about it.

12 THE COURT: Okay. So -- all right, but in any event
13 you haven't made up your mind yet.

14 UNKNOWN SPEAKER: No.

15 THE COURT: Okay.

16 UNKNOWN SPEAKER: No, Judge.

17 THE COURT: And what happened? I should return now
18 because I -- the other question I had was what happened with
19 Judge -- what's happened before Judge Irizarry so far?

20 MS. BECKER: There -- she held a conference, not
21 really a hearing because witnesses weren't called, but when
22 the New York Attorney General reported to Judge Irizarry that
23 the seal had been broken she held a conference with respect to
24 the breaking of the seal.

25 THE COURT: I see. And what happened?

1 MS. BECKER: She held a conference and didn't --
2 there -- I'm not sure whether she intends to make
3 determinations with respect to that or whether that will just
4 stay that.

5 THE COURT: So at this point the seal was broken by
6 someone unknown?

7 UNKNOWN SPEAKER: Unknown --

8 MS. BECKER: No, no. Not unknown.

9 UNKNOWN SPEAKER: No, the AG.

10 MS. BECKER: The AG.

11 THE COURT: Oh.

12 MS. BECKER: And that was the purpose of the
13 conference was to determine who within the AG's office had
14 broken the seal and the judge ferreted that out. Not that the
15 AG was trying to hide anything, but in fact the AG was very
16 forthcoming and provided all that information.

17 THE COURT: So it's yet to be seen what's going to
18 happen as a result of that.

19 MS. BECKER: Exactly.

20 THE COURT: Okay. Okay. So this -- thank you. And
21 are you related to any of the defendants?

22 MS. BECKER: Not that I know of.

23 THE COURT: Okay. All right. So does anybody else
24 want to be heard on -- well, at this point -- thank you,
25 Ms. Becker. You may be seated. And by the way, nobody

1 else -- you don't really have to stand. You're free to, but
2 actually the closer you are to the microphones the better the
3 record anyway, so you're free to remain seated.

4 As I understand, the time to respond has been
5 extended by stipulation for virtually everybody, right? Is
6 that -- all right. So is it anticipated there'll be motions
7 to dismiss all or part of the claims or do you -- have you
8 made up your minds yet?

9 MR. LURIE: Yes, Your Honor. This is Adam Lurie.
10 There's currently a motion to transfer the matter to the
11 Southern District.

12 THE COURT: Yes, that's right. Thank you for
13 reminding me.

14 MR. LURIE: And the --

15 THE COURT: That has been briefed and is before
16 Judge Irizarry already?

17 MR. LURIE: It's not been briefed. The defense
18 motions and briefs have been served on plaintiff's counsel in
19 response.

20 THE COURT: Okay. And just as a reminder, I know --
21 I mean, I was told this already, but I -- or I read it
22 somewhere, but have you also been given a briefing schedule
23 for the motions to dismiss? So --

24 MR. LURIE: Yes, well --

25 THE COURT: -- then that's before Judge Irizarry.

1 Did you make a request for a premotion conference? Usually
2 she requires one.

3 MR. LURIE: The only date we have, Your Honor, is
4 the motion to respond to the complaint and that is --

5 THE COURT: I see.

6 MR. LURIE: -- on December 15th.

7 THE COURT: So what -- then what you're going to end
8 up doing is write a letter to her for a premotion conference
9 at that point, I guess.

10 MR. LURIE: I assume, Your Honor.

11 THE COURT: But then I gather that to some extent
12 the question of whether this -- that motion should be heard
13 here or elsewhere has got to be on the table as well, so kind
14 of complicated.

15 All right. All right. Does anybody else -- I mean,
16 does anybody want to weigh in at all on -- I mean, I've got a
17 general understanding of the claims. I don't know if there's
18 any reason to go into any detail about your defenses at this
19 point since that, I suppose, is going to be illuminated by the
20 answers to the complaint and the motion practice that's still
21 to come, so I don't know that I need to tease that out right
22 now unless somebody feels like they want to be heard on that.
23 Okay.

24 So let me turn to the issue raised by the motions --
25 the motion that the plaintiff -- or I'll say the relator --

1 the relator has made concerning instructions given I think to
2 the Department of -- Department of Labor -- the New York
3 Department of Labor given by the -- an agency head or someone
4 in that office to the employees there to -- not to respond or
5 not to speak to anyone about the claims here. So who is
6 handling that on behalf of the State?

7 MR. LURIE: Your Honor, Adam Lurie for
8 [indiscernible].

9 THE COURT: Okay.

10 MR. LURIE: Your Honor, we are -- we're basically
11 prepared to do most, if not everything, that the plaintiff
12 wants voluntarily.

13 THE COURT: Oh, okay.

14 MR. LURIE: We're prepared to issue corrected
15 language through the Department of Labor. We provided some
16 draft language to the plaintiff just this morning.
17 Plaintiff's counsel provided us with a proposed order for the
18 Court which has some alternative language. We'd be frankly
19 happy to work with that language and provide something again
20 voluntarily from the Department of Labor to its employees.

21 THE COURT: What timetable do you propose?

22 MR. LURIE: We could probably hammer this out in the
23 next day or two, Your Honor.

24 MS. BECKER: That's fine with us, Your Honor. I
25 think then maybe the remaining bone of contention would be --

1 and correct me if I'm wrong, brother counsel -- whether it
2 should take the form of an order or a corrected memorandum.

3 THE COURT: I'll let you try to work that out.

4 MS. BECKER: Okay.

5 THE COURT: I'm not in a position really at this
6 point to weigh in in any way, but -- it seems to me. I
7 just -- I have a general understanding of what's going on, but
8 I haven't really heard a response from on -- from a legal
9 standpoint on the Department of Labor. Right? I mean --

10 MR. LURIE: Your Honor, I think we disagree with
11 some of the underlying legal argument in favor of the
12 corrective action, but we recognize the concern. We want to
13 address it and so we're prepared to do so voluntarily.

14 Just with respect to whether or not the Court needs
15 to issue an order, I think we'll be able to moot the issue.
16 I don't think it's necessary --

17 THE COURT: Okay. Well, that's why -- I mean, I --
18 to the extent that you can't come to an agreement on whatever
19 aspects that you can't come to an agreement on, then I'll
20 expect you to provide your response because the state of the
21 record now is that the State asks that they not be required to
22 respond until -- well, just ask that they not be required to
23 respond. At the time there was nobody representing Governor
24 Cuomo or -- I don't know. Is the State -- is the State --
25 it's sort of interesting. The State is also one of the --

1 going to be asked whether they want to join, but I gather
2 they're probably not. The State *qui tam* statute is probably
3 the same as the federal.

4 What's the fraud on the State, by the way?

5 MS. BECKER: The fraud on the State is with respect
6 to the inflated attorney's fees received by plaintiff's
7 counsel.

8 THE COURT: By plaintiff's counsel.

9 MS. BECKER: In the --

10 THE COURT: Which plaintiff's?

11 MS. BECKER: In the class action.

12 THE COURT: I see. All right. Was that class
13 action in federal court or state court?

14 MS. BECKER: Federal court.

15 UNKNOWN SPEAKER: In the Southern District, Your
16 Honor. That's why we're moving -- that's why we've moved to
17 transfer.

18 THE COURT: And is the suggestion -- wasn't that --
19 I mean, I guess that the class action -- if -- to the extent
20 it resulted in an amelioration plan there was some kind of
21 settlement which was approved by the Court.

22 MS. BECKER: I think --

23 THE COURT: And is it your contention that the Court
24 approved a fraudulent attorney's fee award?

25 MS. BECKER: Well, the thing is, what the Court

1 approved was a system by which the plaintiffs from the class
2 action would submit their fees. And those fees were supposed
3 to be reviewed from someone from the Unemployment Appeals
4 Board in this instance by Judge Rold. And when Judge Rold was
5 first --

6 THE COURT: I guess I'm confused about which
7 plaintiffs.

8 MS. BECKER: The --

9 THE COURT: The class plaintiffs?

10 MS. BECKER: The class plaintiffs, Raff and Becker.

11 THE COURT: Oh, I see. Raff and Becker represented
12 a class of plaintiffs.

13 MS. BECKER: Yeah. And so the first plain --
14 attorney's fees' letter petition that was received by Judge
15 Rold for him to review he reviewed, had serious problems with,
16 explained it to the Secretary of Labor, said that he wanted --
17 that they -- that he would not sign off on them because they
18 were not appropriate.

19 THE COURT: I see. Okay.

20 MS. BECKER: Then -- so that's the New York --

21 THE COURT: I see.

22 MS. BECKER: -- *qui tam*.

23 THE COURT: Okay. I get it. Anyway, so let me --
24 as -- let me return to the most recent issue and that is -- I
25 mean, the -- the issue about the -- what kind of corrective

1 action and what the form of that should be with respect to the
2 directive that was given by the Department of Labor.

3 To the extent that there are things you can't agree
4 upon in terms of the corrective action, then it seems to me
5 the next appropriate step would be for the State to respond to
6 the motion. I'll give you a deadline for doing that. And
7 then to give the plain -- the relator a chance to respond to
8 that.

9 So I might as well set those dates now in case you
10 can't reach agreement. I mean, I hope you can but I might as
11 well set those deadlines. Does that sound right?

12 MS. BECKER: Right. Although from what I'm hearing
13 from brother counsel is that we're relatively close and I do
14 think that the -- really, the only concern is whether there
15 ought to be an order or not.

16 And I would like to take this opportunity -- and
17 it's Jane Becker talking. I'm sorry -- the -- to tell the
18 Court that I personally have spoken to one former judge and
19 one current judge who is about to leave. And that judge --

20 THE COURT: Leave?

21 MS. BECKER: Leave the --

22 THE COURT: The bench?

23 MS. BECKER: The Unemployment Appeals Bureau and
24 that judge spoke to me two days ago and told me that there is
25 an atmosphere of fear because of the memorandum that was sent

1 out. And the only -- that was the only reason that that
2 judge -- the only reason that that judge was willing to speak
3 to me was because that judge -- I'm trying not to use
4 gender -- was leaving and that judge felt that other judge --
5 other judges had expressed concern about retaliation for
6 cooperation with plaintiff's counsel. So that's why we so
7 firmly believe that there is a need for an order from this
8 court that will give the potential witnesses the comfort that
9 they need to talk to not only our client but presumably with
10 the U.S. Attorney's Office. And given that the time for the
11 U.S. Attorney's Office to decide whether to intervene or not
12 expires --

13 THE COURT: It sounds to me like you're just making
14 the argument that I suggested you could make in response to
15 what Mr. Lurie is going to submit to me if you can't reach an
16 agreement. I'm not prepared to give you a ruling on that
17 issue now.

18 MS. BECKER: Okay.

19 THE COURT: And that's what I was inviting you to
20 try to reach an agreement on. I'll have to hear from
21 Mr. Lurie as to any objections he has to entering an order.
22 That's part of the things you can't resolve. I don't know
23 whether that's going to be what you can't resolve, but let's
24 let the process work out. It's not going to take too much
25 longer because I'm going to -- I do want to set tight

1 deadlines for doing this.

2 So if Mr. Lurie said he thinks he's not -- he's
3 going to be able to resolve it with you in the next day or so,
4 to the extent that there's something that you can't resolve in
5 the next day or so -- today is Thursday, so we're talking
6 about Friday, Monday -- so to the extent that you can't, just
7 write me a letter by Wednesday and then you can have -- I
8 don't know how much time you want to respond to Mr. Lurie's
9 letter.

10 MS. BECKER: We should be able to respond to it by
11 next Friday.

12 THE COURT: Okay. So file any -- we'll call it
13 opposition to the motion that's now pending, Mr. Lurie, by
14 next Wednesday and you'll file your reply to that by Friday,
15 then I'll make a decision. And to the extent that there are
16 alternatives that -- you know, alternative language you want
17 to, you know, submit a proposed order or proposed -- whatever,
18 you know, as part of your submissions. Okay?

19 MR. LURIE: Thank you, Your Honor.

20 THE COURT: Otherwise, what else should I schedule
21 at this point? It seems to me there's not a point in
22 scheduling anything further before me now any specific date
23 until we see how the motion to transfer works out and how any
24 motions attacking the pleadings work out. Anybody have any
25 different view?

1 MS. BECKER: The only -- Jane Becker. The only
2 other thing that's pending -- and we are, in fact, working on
3 it -- is a stipulation regarding a protective order so that
4 the relator can produce to the United States Attorney's Office
5 the documents. We have -- it's our contention that none of
6 the documents are privileged, but we understand fully that the
7 defendants have -- not may have; they have -- a different
8 perspective -- position with respect to that.

9 So we have initially sent -- because the U.S.
10 Attorney asked us for the grievance and its attachments, we
11 have already started working on an agreed upon -- a stipulated
12 protective order regarding that and the U.S. Attorney's Office
13 has received a copy of that because obviously it's the U.S.
14 Attorney who has to decide to -- whether that is acceptable in
15 terms of the U.S. Attorney's investigation.

16 And we will be providing the remainder of the
17 documents to defendants by probably this coming Monday so
18 that --

19 THE COURT: I'm really not -- I'm not understanding
20 this very much. To the extent that you want a protective
21 order --

22 MS. BECKER: Um-hum.

23 THE COURT: -- you can make a motion for one and if
24 it's plain on the face of the protective order that's
25 submitted as what is specifically going to be protected and

1 that there is a need for protection, then you can count on me
2 signing it.

3 If either of those is not clear on its -- on the
4 face of the protective order, then you're going to need to
5 explain to me -- well, first of all, the protective order is
6 going to have to -- will have to be specific about what it is
7 that's subject to the order. And I won't sign a protective
8 order that cedes to the parties the right to designate
9 anything that they think in good faith ought to be protected.
10 You're going to have to identify with specificity what it is
11 that's to be protected. And to the extent that it's not plain
12 to me on the face and in those documents are -- that
13 protection is warranted for those kinds of documents, then you
14 need to make some kind of submissions to demonstrate why the
15 standards for protective order as set forth in Rule 26(c)
16 apply and why the confidentiality should be met.

17 So typically medical records, personnel records,
18 those sorts of things that are usually subject to privacy
19 concerns are things that will qualify ordinarily and don't
20 require any further explanation. If it's something beyond
21 that, well, I don't want to -- I guess I'm telling you what
22 the standards are that I will be applying to any protective
23 order that you're going to ask me to sign.

24 MR. CLEARY: Your Honor, what I saw today -- this is
25 Kevan Cleary from the Government -- what I say today because I

1 just got it this morning right before our session today, it
2 has -- it's very extensive. I mean, it has -- this is not a
3 waiver of subject matter jurisdiction by producing the
4 document. I always understood you cannot waive subject matter
5 jurisdiction no matter what you say.

6 UNKNOWN SPEAKER: Attorney/client.

7 THE COURT: That's correct. There's no --

8 MR. CLEARY: Yeah, that's in here.

9 THE COURT: The matter jurisdiction is always for
10 the Court to determine --

11 MR. CLEARY: Yes.

12 THE COURT: -- and nobody can say --

13 MR. CLEARY: Nobody can waive it.

14 THE COURT: Nobody can waive it.

15 MR. CLEARY: Okay. Now, the other thing is, it
16 has --

17 THE COURT: I don't know -- I don't -- look, do we
18 need to go into detail now? I mean --

19 MR. CLEARY: No, no, Judge, if you don't want to
20 hear it.

21 THE COURT: I'd like to let you try to work these
22 things out and because I don't know that -- I mean, unless you
23 have a question about what should be subject to the order.

24 MR. CLEARY: Well, they have a -- they revived the
25 seal thing where everything that mentions this grievance has

1 to be filed under seal, so here we go again.

2 THE COURT: And which grievance are we talking
3 about?

4 MR. CLEARY: This grievance they're going to produce
5 to the United States Attorney that anybody who makes --

6 THE COURT: About --

7 MR. CLEARY: -- writes -- makes a motion or writes a
8 letter and references it all has to be filed under seal. This
9 is onerous.

10 THE COURT: Well, that's why I may not sign a
11 protective order. Look --

12 MS. BECKER: Your Honor --

13 THE COURT: I don't know exactly what it is that
14 you're talking about. You're going to have to see if you can
15 work out what it is you want to make subject to the order. I
16 thought Ms. Becker was saying you wanted it subject to an
17 order. Well, you know, and I don't know what grievance you're
18 talking about even. I mean, so --

19 MR. CLEARY: The judge filed the grievance.

20 MR. HAWKINS: Your Honor, could I --

21 MS. BECKER: The only reason --

22 MR. HAWKINS: Howard Hawkins from Cadwalader. Could
23 I be heard on this?

24 THE COURT: You might as well.

25 MR. HAWKINS: Thank you.

1 THE COURT: Everybody else has been -- well, not
2 everybody.

3 MR. HAWKINS: Yeah.

4 THE COURT: You haven't yet been heard, so you can
5 talk.

6 MR. HAWKINS: Thank you, Your Honor, for Governor
7 Cuomo. And this issue is, again, for the State or the
8 Department of Labor.

9 The grievance in question is Judge Rold's grievance
10 concerning the circumstances of his termination, so he wrote a
11 grievance to the Department of Labor complaining that he had
12 been fired. He was chief judge of the Unemployment
13 Compensation Board. He was also general counsel of that
14 Board. We have reviewed the substance of the grievance and we
15 believe strongly on behalf of the State and of the Department
16 of Labor that there is privileged information in his grievance
17 relating to the class action because, as Ms. Becker explained,
18 he was -- he says he was terminated because of positions he
19 took with respect to how the State was dealing with that class
20 action.

21 This, by the way, is the class action in the
22 Southern District to which we suggest that this Court should
23 transfer this case. It would be over there with the same
24 court that has the class action.

25 THE COURT: With the same judge, you mean?

1 MR. HAWKINS: Yes. Judge Pres -- Chief Judge
2 Prescott.

3 THE COURT: I see. In other words, it would be
4 your -- it is your contention that it's a related case in a
5 sense and to these -- the class action that --

6 MR. HAWKINS: Yes.

7 THE COURT: -- that apparently in some way gives
8 rise -- well, I guess it does in a major way give rise to the
9 claims here.

10 MR. HAWKINS: Absolutely.

11 THE COURT: Not all the claims but some of the
12 claims. Okay. I understand the position.

13 MR. HAWKINS: So that is why --

14 THE COURT: So you're the one that has the privilege
15 concern.

16 MR. HAWKINS: Absolutely. The Department of Labor
17 of the State of New York holds the attorney/client privilege
18 with respect to its former employee Judge Rold who, of course,
19 cannot make the privilege; it belongs to the State.

20 THE COURT: So these are complicated issues and I'm
21 not going to be able to deal with them --

22 MR. HAWKINS: Well --

23 THE COURT: -- in the abstract.

24 MR. HAWKINS: All I want to say, Judge, is we
25 propose a workout of this --

1 THE COURT: Okay.

2 MR. HAWKINS: -- where we'll give the document over
3 to the U.S. Attorney's Office. We're pleased to let them have
4 it and do whatever they want with it. We just want an
5 agreement that that doesn't waive attorney/client privilege.

6 THE COURT: Okay.

7 MR. HAWKINS: And if there are concerns about seal
8 or not, you know, we can work on that, too. We -- all we want
9 is not to have their -- not to there be a subject matter
10 waiver of attorney/client privilege.

11 THE COURT: Subject matter waiver. Now you're
12 talking about subject matter -- not talking about subject
13 matter jurisdiction. You're talking about subject matter
14 waiver --

15 MR. HAWKINS: Yes, sir. Yes, sir.

16 THE COURT: -- as it applies to the privilege.
17 Okay.

18 MR. HAWKINS: Yes, Your Honor.

19 THE COURT: Again, these are pretty complicated
20 issues. How far the privilege extends if you're going to ask
21 me to sign a protective order extending a privilege to
22 these -- to whatever it is that your -- well, at this point I
23 don't know how much of the grievance -- I mean, maybe it's the
24 entire document, maybe it's all the documents related to the
25 grievance. I just don't know how broadly you want to assert

1 the privilege and -- but I will have, it seems to me, to make
2 at least some preliminary assessment about whether there is a
3 valid claim of privilege that would attach to the documents
4 and sounds like --

5 MR. HAWKINS: Your Honor, we're --

6 THE COURT: It sounds like you may be in a position
7 to make that case. I --

8 MR. HAWKINS: We're pleased to make that case and
9 we're pleased to submit it in camera. We are suggesting a
10 work-around of the issue.

11 THE COURT: Right.

12 MR. HAWKINS: By simply having all the parties agree
13 that whether or not it's privileged there's no subject matter
14 waiver, which is our own concern.

15 THE COURT: Yeah. So that you don't -- you mean, by
16 producing the document you're not giving up the argument that
17 other matters related to that document are no longer
18 privileged.

19 MR. HAWKINS: Exactly.

20 THE COURT: Sounds like a pretty reasonable work-
21 around. I'll leave it up to you to try to work it out.

22 MR. HAWKINS: Thanks, Your Honor.

23 MS. BECKER: Your Honor, more than anything all I
24 wanted to do was just mention it because it's something that
25 would more traditionally come up in discovery, but in this

1 case has come up at this early stage because it's some --

2 THE COURT: The Government needs it in order to make
3 its assessment about whether -- about which -- whether to step
4 into the case or not.

5 MS. BECKER: Exactly.

6 THE COURT: Yeah. So I mean, I agree that that's an
7 issue that ought to be addressed promptly or as promptly as
8 possible now while there's other things still percolating
9 that -- you know, in other words, get that -- let's try to get
10 that out of the way so that it doesn't become a barrier once
11 the other issues are resolved -- a barrier doesn't become a
12 problem in terms of moving the case forward.

13 All right. What else? No, anything? And nobody
14 disagrees that there's no point -- well, that's a lot of
15 negatives. There's -- is there any -- does anybody believe
16 that there's a point in my scheduling at this point, a
17 specific date for another conference? Okay. All right.

18 So I'll -- we've got the briefing in place to the
19 extent it may be necessary with respect to the motion and if I
20 need argument -- further argument on that I'll bring you in,
21 but otherwise I intend to -- if I have to issue a ruling it
22 will be on paper, okay? Thank you very much.

23 ATTORNEYS: Thank you, Your Honor.

24 (Proceedings concluded at 11:41 a.m.)

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1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

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7 Ruth Ann Hager, C.E.T.**D-641

8 Dated: November 14, 2012

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